

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUMA MUHUMED,

Claimant,

vs.

ABM JANITORIAL SERVICES,

Employer,

and

ESIS,

Insurance Carrier,
Defendants.

File No.: 5046434

APPEAL

DECISION

FILED

APR 28 2017

WORKERS' COMPENSATION

Headnote Nos.: 1108, 1801, 1803
2500, 3001, 5-9999

STATEMENT OF THE CASE

On March 29, 2017, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated the authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency. The decision in this matter shall be the final agency action.

This arbitration hearing was held on December 17, 2014, in Des Moines, Iowa. The parties filed post-hearing briefs. The case was deemed fully submitted on January 12, 2015. The deputy issued the arbitration decision on November 17, 2015.

The deputy commissioner determined claimant was entitled to: (1) temporary total disability benefits for the period from December 8, 2012, through January 18, 2013, at the rate of two hundred sixteen and 47/100 dollars (\$216.47); (2) certain medical expenses as detailed in claimant's Exhibit 24; and (3) the cost of the independent medical exam as outlined in claimant's Exhibit 23.

On November 30, 2015, claimant filed a notice of appeal. The brief was filed on January 6, 2016. Claimant's brief contained what has been called, "Attachment #1." Claimant listed the following issues on appeal:

- A. Claimant demonstrated the work injury of October 26, 2012, was the cause of permanent impairment; claimant is entitled to an industrial disability award.

- B. Claimant is entitled to healing period benefits in the time period between January 16, 2013, and July 31, 2013.
- C. Claimant is entitled to alternate medical care in the form of evaluation by a pain management specialist.

Defendants filed their appeal brief on January 29, 2016. Defendants asserted the deputy's decision should be affirmed in its entirety. In the appeal brief the defendants responded to the three issues claimant addressed.

The record in this case was reviewed de novo. Both sides dictated the issues to be determined on appeal. See: Iowa Code section 17A.15; and Rule 876 IAC 4.28(7). The party who would suffer a loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule App. P. 6.14(6).

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm in part as the final agency decision certain portions of the proposed arbitration decision filed on November 17, 2015, and I modify certain portions of the proposed arbitration decision which relate to the issues properly raised on intra-agency appeal.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960)

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavy v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The hearing deputy dismissed many of claimant's contentions because the deputy found claimant lacked credibility. The hearing deputy explained at pages 7 and 8 of the arbitration decision:

Based upon the foregoing legal standards, I find that the claimant has failed to meet his burden of proof that the work injury is causally connected to any permanent disability. The biggest deficiency in claimant's argument is his medical history. The claimant is a remarkably poor historian. The claimant was seen for low back pain on October 9, 2012, just over two weeks prior to the work injury, and October 25, 2012, the day before the work injury. On both occasions, the purpose of the visit was low back pain. He has other medical records which demonstrate that he complained of some low back problems in February 2012 and June 2012. While not as significant, these records bolster the inconsistency and further tend to prove that Mr. Muhumed has had ongoing issues with his low back prior to his work injury. Because of his preexisting low back symptoms and his extraordinary poor memory regarding the same, it is very difficult for the claimant to prove the required causal connection between the work injury and any permanent condition in his low back.

Of course under Iowa law, a work injury need not be the sole or primary cause of disability. The injury only needs to be a substantial or aggravating factor. Mr. Muhumed, however, has no recollection whatsoever of any prior low back pain or discomfort prior to his work injury. This severely impacts his credibility and makes it nearly impossible to sort out whether any of his ongoing low back complaints are actually related to the work injury. It is the claimant's burden to prove medical causation by a preponderance of the evidence. He has failed to do so.

(Arbitration decision, pages 7-8)

Then the deputy continued to explain why he accorded more weight to the opinions of Joseph Chen, M.D., rather than to the opinions of the other physicians involved in the case. The hearing deputy wrote at page 8 of the arbitration decision:

Furthermore, I find the expert opinion of Dr. Chen to be the most credible expert opinion in the record. **He evaluated the claimant upon a referral from the claimant's counsel, performed a thorough evaluation and reviewed the MRI.** He opined that the claimant needed no restrictions and had no ratable permanent functional disability. The diagnosis was mechanical or myofascial low back pain. His opinion is free of bias and is entirely consistent with the previous opinions of Dr. Bahls and Dr. Igram, which also do not support permanency. The best evidence in the record does not support a finding of medical causation.

(Arb., p. 8) (Emphasis added.)

The hearing deputy mistakenly believed claimant's counsel, Mr. Ozga, sent claimant to Dr. Chen. Dr. Chen also believed claimant was sent to him per Mr. Ozga. Both Dr. Chen and the hearing deputy were mistaken. Those were minor factual mistakes. However, the transcript of the proceedings resolved the small factual errors:

Q. (By Mr. Ozga) Now, you also saw two doctors for evaluation, Dr. Chen at the University of Iowa and Dr. Sassman.

Do you know who sent you to see Dr. Chen at the University of Iowa?

A. Yes.

Q. Who was that?

A. My lawyer send me.

Q. I didn't send you to Dr. Chen.

MR. KING: I'd just object. It's leading, because he answered the question already. The questions has been asked and answered.

I don't know if Marty is testifying. But - -

THE DEPUTY COMMISSIONER: Go ahead and re-ask the question.

MR. OZGA: Sure

Q. Do you know who sent you to Dr. Chen?

A. I think I did.

I'm not remember. I think I go myself.

Q. Okay. All right.

(Transcript pages 35-36)

During cross-examination, the following questioning occurred:

Q. (By Mr. King) Then you did get to see Dr. Chen, it looks like to me, at the University of Iowa Hospitals.

A. Yes.

Q. And he's the head of their spinal rehabilitation program, I know, there.

And you saw him on November 6th of 2013.

Does that sound right?

A. Yes. Yes.

Q. And he says here that you "are a 38-year-old man who has been referred by Mr. Martin Ozga."

Does that sound right to you?

A. Yes, I did.

I did not say lawyer send me, but I remember going to that doctor.

(Tr, pages 57-58)

Counsel for claimant attempted to submit "Attachment # 1" to the appeal brief. Defendants, in their appeal brief at page 8, challenged claimant's right to submit evidence outside the record. Defendants argued:

Deputy Walsh further found Dr. Chen's opinions most credible in concluding Muhumed had no permanent functional impairment, no need for permanent work restrictions and no need for additional medical care. Arbitration Decision, p. 9 Deputy Walsh noted the Dr. Chen visit was made at the referral of his attorney. Arbitration Decision, p. 9. Claimant's counsel now challenges this notion by introducing improper evidence outside the record. Claimant has attached an email of the claims adjuster without providing any context or ability of Defendants to rebut or impeach his suggestion. **The attempt to introduce new evidence now is wholly improper.** (Bold in the original.)

(Defendants' Appeal Brief, page 8-9)

Defendants are correct. Claimant may not submit additional evidence outside the record. The record was closed on December 17, 2014, when the arbitration concluded. Rule 876 IAC 4.31 provides, "No evidence shall be taken after hearing." Claimant's "Attachment #1" is not accepted as evidence in this case.

Even though claimant's attachment was not accepted as evidence in the record, there was sufficient testimony during the arbitration hearing to establish the fact neither Mr. Ozga nor the claimant retained the services of Dr. Chen to examine and render a

medical opinion. Nevertheless, the referring party it is not relevant to the disposition of the case. I too find the opinion of Dr. Chen to be the most credible expert opinion in the record.

Dr. Chen is a Clinical Associate Professor in the Department of Orthopaedics and Rehabilitation at the University of Iowa Hospitals and Clinics. He is very well respected in the area of spinal rehabilitation. He has provided expert medical opinions in the workers' compensation arena for both claimants and defendants. He does not have a reputation as a physician who only provides opinions for one side or the other. He is viewed as unbiased by the undersigned.

Dr. Chen noted the examination on November 6, 2013, lasted 82 minutes, of which 63 minutes consisted of counseling and/or coordination of care. (Ex. 14, p. 57) Dr. Chen had the benefit of an interpreter when he communicated with claimant.

An orthopedic specialist reviewed the MRI test results of the lumbar spine with claimant. The physician explained to claimant:

I reviewed his MRI images and reinforced to him that there is no wound or abnormality that explains his pain or that needs any further medical treatment.

(Ex. 14, p. 56)

Dr. Chen diagnosed claimant as follows:

IMPRESSION:

Jama A. Muhumed is a 38 y.o. man who has predominantly chronic mechanical and myofascial low back pain. He has had lumbar spine imaging which only reveals age-appropriate changes without any worrisome bony or neurological abnormalities. The majority of his pain is likely myofascial based upon it being quite easily reproduced on examination today with palpation, passive stretch of the piriformis, and activation of the gluteal attachment muscles. I showed him some additional stretching exercises, hip abductor stretching exercises and encouraged him to resume his activities gradually and as soon as possible.

....

For workers['] compensation purposes, I told him that there is no further medical treatment for this type of myofascial pain that I would recommend. He requires no permanent work restrictions. He also has no ratable

impairment according to the AMA Guides to the Evaluation of Permanent Impairment, 5th edition.

(Ex. 14, p. 57)

I concur with the opinion of the hearing deputy with respect to the issue of medical causation. The best evidence in the record does not support a finding of medical causation.

Since claimant failed to meet his burden of proof with regard to medical causation and permanency benefits, it is unnecessary to address the commencement date for permanency benefits. Claimant is not entitled to permanent partial disability benefits.

With respect to the remaining issues and argument of the parties, this deputy reaches the same analysis, findings, and conclusions as those reached by the deputy commissioner who heard the arbitration hearing.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

ORDER

IT IS THEREFORE ORDERED that the decision filed on November 17, 2015, is affirmed in part and modified in part.

Defendants shall pay the claimant temporary total disability benefits beginning on December 8, 2012, and continuing through January 18, 2013, at the rate of two hundred sixteen and 47/100 dollars (\$216.47).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the medical expenses as outlined in claimant's Exhibit 24.

Defendants shall pay the IME expenses as outlined in claimant's Exhibit 23.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and claimant and defendant shall equally pay the costs of the appeal, including the cost of the hearing transcript.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 28th day of April, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Martin Ozga
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266
mozga@nbolawfirm.com

Peter J. Thill
Attorney at Law
1900 E. 54th Street
Davenport, IA 52801
pjt@bettylawfirm.com